UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 6

GIANT EAGLE, INC.

Case 06-CA-188991

and

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 23 CLC

GIANT EAGLE, INC.'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

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I. Introduction

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Giant Eagle, Inc. ("Giant Eagle") hereby files this Brief in Support of its Exceptions to the Administrative Law Judge's ("ALJ") decision, which was filed on March 14, 2018, in the above captioned case. The ALJ found that Giant Eagle committed various unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act ("the Act").

Though forceful in his pronouncements that Giant Eagle violated the Act, careful examination of the legal theories proffered by the ALJ reveals that his decision muddles well-settled Board precedent in an effort to bring Giant Eagle's conduct within existing doctrines under the Act. In doing so, the ALJ committed numerous evidentiary, factual, and legal errors and eviscerated Giant Eagle's free speech rights under Section 8(c) of the Act. Moreover, the ALJ's decision substantially departs from the charges in General Counsel's complaint and from the evidence adduced at trial, and contains findings that Giant Eagle was not given a meaningful opportunity to litigate. Accordingly, for the reasons set forth below, Giant Eagle respectfully requests that the Administrative Law Judge's Decision ("ALJD") be reversed and that the complaint in this matter be dismissed in its entirety.

II. Statement of the Case

On November 28, 2016, the United Food and Commercial Workers Union, Local 23 ("Local 23" or "Union"), filed a charge against Giant Eagle alleging that Giant Eagle committed various unfair labor practices under the Act. Thereafter, the Union amended its charge twice.

On April 28, 2017, pursuant to the Union's third amended charge, General Counsel for the National Labor Relations Board, Region 6 ("General Counsel") filed a Complaint and notice of hearing, alleging that Giant Eagle committed violations of Section 8(a)(1) of the Act based upon the following: (1) conditioning receipt of information regarding a wage increase on employees requesting and obtaining a waiver from the Union; (2) conditioning receipt of information regarding health care benefits on employees requesting and obtaining a waiver from the Union; (3) conditioning its consideration of a represented employee for promotion on employees requesting and obtaining a waiver from the Union; (4) announcing in writing to represented employees, changes in Giant Eagle's Income Security and Employee Savings Plans, without first communicating with the Union. *Complaint* at ¶¶ 7-9.

On January 25, 2018, the case came before Administrative Law Judge David I. Goldman for a hearing. The parties subsequently submitted post-trial briefs and on March 14, 2018, the ALJ issued his decision and order, concluding that Giant Eagle committed unfair labor practices in violation of Section 8(a)(1) of the Act.[1]

[1] The ALJ's findings that Giant Eagle committed unfair labor practices were largely based upon theories not advanced by General Counsel or otherwise supported by the record. As will be discussed in further detail *infra*, the ALJ's conclusions in this regard are inconsistent with his evidentiary rulings at trial, in which he precluded Giant Eagle from submitting evidence explaining its motivation for various decisions. As a consequence, Giant Eagle was not afforded a fair opportunity to rebut the allegations. At a minimum, this matter should be remanded so that Giant Eagle can be afforded an opportunity to put additional evidence on the record and, for the first time, meaningfully address the violation, as found by the ALJ.

III. Statement of the Facts

Giant Eagle is a supermarket chain which operates stores in Pennsylvania, Ohio, Maryland, and West Virginia and employs thousands of employees. Over 5,700 of its employees in Pennsylvania are represented by Local 23 for collective bargaining purposes. On September 15, 2016, the Union filed a petition to represent a group of seven (7) catering employees at Giant Eagle Store # 47, located in Robinson Township, Pennsylvania ("Catering Employees"). *Joint Stipulations* at ¶ 2. Shortly thereafter, a stipulated election agreement was approved by the NLRB and an election was scheduled. On October 7, 2016, the Store # 47 Catering Employees elected the Union as their sole collective bargaining representative, and on October 17, 2016, the Union was formally certified as the exclusive collective bargaining representative of the Store # 47 Catering Employees. *Joint Stipulations* at ¶ 10. This case arises from Giant Eagle's conduct before and after the Union election.

a. Relevant Facts re: Paragraphs VII(a), (b), and (c) of the Complaint (Giant Eagle's Pre-Election Use of Waivers)

Leading up to the October 2016 Union election, Giant Eagle held a series of meetings with the Catering Employees in which it exercised its rights under Section 8(c) of the Act. *See* 29 U.S.C. § 158(c) (providing that "views, argument, or opinion" unaccompanied by any expression of "threat of reprisal or force or promise of benefit," shall not constitute an unfair labor practice). During the first such meeting on September 15, 2016, the Catering Employees volunteered information about the Union drive to Giant Eagle, including the Catering Employees' motivation for filing the representation petition and which Catering Employee initiated the petition. *ALJD* at 4, L 13-25. Specifically, it was disclosed by the Employees that Catering Employee Kelli Murphy had been responsible for getting the Union authorization cards signed, and that the Catering Employees were interested in unionizing, in part, out of concern

over health benefits. *See Transcript* at 78-79 (Kelli Murphy acknowledging that health benefits constituted a reason for the Union drive and that she volunteered to Giant Eagle that she had started the Union organizing drive). In light of this concern, the Catering Employees ***requested*** that Giant Eagle provide them with information regarding 2017 employee health benefits in advance of the October election.[2]

Following up on the Catering Employees' request, during a September 21, 2016, meeting, Giant Eagle reminded the Catering Employees that it typically provides health benefits information in October during the beginning of open enrollment, but that it was reviewing whether it could lawfully share the details of the 2017 plan in advance of the election, as requested. *Joint Stipulations* at ¶ 21; *see also Joint Exhibit* 8(a).

During that same meeting, the Catering Employees indicated that they were also interested in receiving information regarding 2017 wage increases in advance of the election. Like the health benefits information, all Giant Eagle employees are typically told the amount of the discretionary wage increases in the first week of October of each year before it is received in their paychecks during the second week of October. *Joint Stipulations* at ¶ 5. Because the election was also scheduled for the first week of October, Giant Eagle planned on telling the caterers the ***amount*** of the wage increase after the election. *Transcript* at 103-104.[3]

On September 26, 2016, Giant Eagle informed the Catering Employees that their request for information in advance of the Union election placed Giant Eagle in a difficult position. Specifically, Giant Eagle explained that it did not want to appear as though it was unduly

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[2] As will be discussed in further detail *infra*, the ALJ's conclusion that Giant Eagle concocted the scenario raised herein as a mechanism to assign blame to the Union is belied by the undisputed facts of record that it was the Catering Employees who requested the information from Giant Eagle.

[3] Importantly, there was no plan to delay the actual conferral of the wage increase, and the Catering Employees were ensured that the wage increase would take effect regardless of the outcome in the election. *Transcript* at 104.

influencing the vote by providing the information on an accelerated basis. *Joint Exhibit* 8(b).[4] After sharing this concern with the Catering Employees, Giant Eagle proposed a solution whereby it would supply the requested information before the election if the Union agreed not to file any objections or unfair labor practice charges based upon such disclosure. *Id.* Giant Eagle simultaneously provided the Catering Employees with copies of written waivers memorializing this proposal as a suggested mechanism for obtaining the Union's permission to supply the Employees with the requested information. *Joint Exhibits* 2 and 3. **At no point did Giant Eagle threaten to withhold health benefits, wage increases, or any other substantive benefit if the Catering Employees decided to join the Union.**

On September 28, 2016, during a make-up meeting with a Catering Employee who was unable to attend a prior meeting, it was volunteered to Giant Eagle that the vote would be four to three in favor of the Union. *Transcript* at 101. That same evening, Giant Eagle's human resources department learned, for the first time, that Catering Employee Kelli Murphy had submitted a job application for a management position vacancy at another Giant Eagle store location. *Transcript* at 108. Nobody from Giant Eagle prompted her to apply for the position and she had not discussed her application with anyone at Giant Eagle prior to submission. *Transcript* at 81 and 111. Because the interview process for the job coincided with the election campaign, Giant Eagle was once again presented with a dilemma. *Transcript* at 108-110. Specifically, if Giant Eagle offered her the position, the Union could have claimed that it did so in an effort to undermine the election. As with the Employees' request for health benefits and merit increase information, Giant Eagle's solution was to explain the dilemma to the Employees

[4] Though Giant Eagle acknowledges that the test for Section 8(a)(1) violations is an objective one and that its subjective motive does not necessarily exculpate it from liability, as will be discussed in further detail *infra*, the fact that Giant Eagle clearly communicated its concerns before ultimately presenting the Employees with the waivers demonstrates that, in context, no employee could have reasonably felt that the waivers tended be coercive or threatening.

and present them with waivers that would allow Giant Eagle to promote her without fear that the Union would later challenge the election results on that basis. *Transcript* at 110.

The following day, on September 29, 2016, during another meeting with the Catering Employees, Giant Eagle reiterated that it could not provide the requested information regarding 2017 wage increases and health benefits unless the Union signed the waivers. *Joint Exhibit* 8(d). The Catering Employees were then presented with waivers regarding Kelli Murphy's job application and were given assurances that her application would not impact the upcoming election in any way. Kelli Murphy and the other Catering Employees were assured that: (1) Giant Eagle would not challenge her vote in the Union election; (2) she could continue to work in the Store # 47 catering department through the election date, regardless of the outcome of her interview; (3) she could reschedule her promotion interview, which she had unilaterally cancelled, either before or after the election; and (4) Giant Eagle would await its decision on her promotion application until after the election. *Joint Exhibit* 8(d) at 3. Importantly, the promotion waivers specified that the Union was only waiving its right to challenge the election or bring an unfair labor practice claim in the event Kelli Murphy was promoted and that the Union reserved the right to bring such claims in the event she was not promoted. *Joint Exhibits* 4 and 5.[5]

On October 7, 2016, an election was held. Far from being deterred by any of Giant Eagle's campaign tactics, the Catering Employees voted to be represented by the Union and the

[5] Importantly, the Complaint filed by General Counsel did not allege that Giant Eagle improperly disclosed the fact of Kelli Murphy's application to the other Catering Employees. The only allegation raised in the Complaint was that the waiver request constituted an independent Section 8(a)(1) violation, and there is no NLRB precedent that would make such disclosure an unfair labor practice. Moreover, there was no allegation in the Complaint that Giant Eagle was discriminatory in its hiring under Section 8(a)(3) of the Act. Indeed, the evidence demonstrates that Giant Eagle proceeded with her promotion application notwithstanding the fact that none of the waivers were signed. *Transcript* at 87. The only allegation raised in the Complaint was that waiver request constituted an independent Section 8(a)(1) violation.

Union was subsequently certified as the exclusive bargaining representative of the Store # 47 Catering Employees. *Joint Stipulations* at ¶¶ 10-11.

b. Relevant Facts re: Paragraph VIII of the Complaint (Giant Eagle's Post-Election Pension Freeze Notice)

On March 26, 2016, nearly six months before the Union filed its election petition in this matter, Giant Eagle made a business decision to freeze pension savings plans for all of its corporate and non-union employees effective January 1, 2017. *Transcript* at 123. Its decision reflected an effort to control costs across the entire company and affected over 11,000 non-union employees. *Id.* In accordance with applicable ERISA and IRS rules, Giant Eagle planned to announce the pension freeze forty-five days in advance of the freeze taking place, *i.e.*, at least forty-five days before January 1, 2017.

As noted above, the Union was certified as the sole collective-bargaining representative of the Store # 47 Catering Employees on October 17, 2016. On November 9, 2016, Giant Eagle provided a mass notice of the upcoming 2017 pension freeze to thousands its of employees. Inadvertently, notice of the pension change was also sent to the Store # 47 Catering Employees. *ALJD* at 17, L 30-32 (ALJ stating that he accepts Giant Eagle's contention that the mailings were inadvertently sent to the Catering Employees as part of a larger mailing to thousands of non-union employees). The cover letter accompanying the notice stated, in relevant part, as follows:

> Who is affected
>
> The changes outlined above apply to ***all non-union Team Members*** who are eligible for the Pension Plan and/or the 401(k) Plan. Retirees and terminated vested participants in the Pension Plan (participants who are no longer employed by Giant Eagle but are due a pension benefit in the future) are not affected by these changes.[6]

[6] Because the Catering Employees did not have any retirees among them, the inclusion of this clause suggests a broader audience.

Joint Exhibit 7(b) (emphasis added). Additionally, as part of the same mailings, the employees were sent a series of brochures on Giant Eagle's pension plan, which provided additional information and reiterated that the freeze affected all non-union team members. *Giant Eagle's Exhibit* 2; *see also Transcript* at 122-23 (*Giant Eagle's Exhibit 2* admitted without objection).[7]

On December 8, 2016, Giant Eagle provided the Union with notice of the pension freeze. *Joint Stipulations* at ¶ 12. That same day, Giant Eagle entered into negotiations with the Union wherein the issue of the pension freeze was discussed. *Transcript* at 124-25. The original Union charge in this matter alleged that Giant Eagle violated Section 8(a)(5) of the Act when it provided the Catering Employees with notice of the pension freeze because it "engaged in this conduct without prior notice to the [U]nion and without having afforded the [U]nion an opportunity to negotiate and bargain as the exclusive representative of [Giant Eagle]'s employees." *Original Union Charge*, 11/28/2016, at ¶ 8. Ultimately, however, General Counsel did not pursue any claim against Giant Eagle under Section 8(a)(5), correctly concluding that any technical defect in the pension freeze notice was cured when Giant Eagle subsequently provided the Union with notice and an opportunity to bargain on that issue. Accordingly, the only remaining claim against Giant Eagle related to the pension freeze alleged an independent violation of Section 8(a)(1).

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[7] The ALJ neglected to mention this fact in his decision. As will be discussed in further detail *infra*, the ALJ's conclusion that the Catering Employees could reasonably interpret the pension freeze as retaliation for the recent decision to unionize is belied by the fact that the cover letter clearly stated that the change applied to all non-union employees. It is entirely unreasonable to conclude that Giant Eagle would announce a company-wide pension freeze affecting thousands of employees in order to retaliate against seven (7) catering employees at one store location for joining the Union. In fact, during her direct examination, witness for General Counsel Linda Zinkham testified that upon receiving similar mailings from the company with respect to health benefits, she "just assume[d] it was sent company wide." *Transcript* at 37, L 21-22. Accordingly, the only reasonable conclusion for the Catering Employees to draw upon receiving the notice was that the decision reflected a company-wide policy unrelated to the recent election.

IV. Questions Presented

While Giant Eagle has set forth numerous exceptions to the ALJ's decision, which challenge evidentiary rulings at trial, factual findings, and legal conclusions, all of the exceptions relate to the following six issues:

a. Whether Giant Eagle's Due Process rights were violated where the ALJ's decision was based upon theories not advanced by General Counsel and Giant Eagle was not given a meaningful opportunity to litigate those issues. (Exceptions 3, 6, 7, 9, 14, 15, 16, 18, 21, 22, 23, 24, 25).

b. Whether the ALJ failed to apply an objective standard in evaluating Giant Eagle's conduct, as required under the Board's Section 8(a)(1) precedents. (Exceptions 9, 14, 16, 18, 21, 22, 23, 24, 25).

c. Whether Giant Eagle's use of waivers with respect to the wage increase and health benefit information violated Section 8(a)(1) of the Act. (Exceptions 2, 5, 9, 10, 11, 12, 21, 24, 25).

d. Whether Giant Eagle's use of waivers with respect to a Catering Employee's promotion violated Section 8(a)(1) of the Act. (Exceptions 1, 3, 6, 7, 13, 14, 15, 16, 17, 18, 22, 24, 25).

e. Whether Giant Eagle's announcement of a company-wide pension freeze violated Section 8(a)(1) of the Act. (Exceptions 8, 19, 20, 23, 14, 25).

f. Whether the ALJ's decision eviscerates Giant Eagle's Free Speech rights and negates Section 8(c) of the Act. (Exceptions 4, 21, 22, 24, 25).

V. Argument

a. The ALJ violated Giant Eagle's Due Process rights by making numerous findings not raised in General Counsel's Complaint or supported by the record, and without affording Giant Eagle a meaningful opportunity litigate those issues. (Exceptions 3, 6, 7, 9, 14, 15, 16, 18, 21, 22, 23, 24, 25).

Both the Administrative Procedure Act, 5 U.S.C. § 554(b)(3), and the NLRB Rules, 29 C.F.R. § 102.15, require that a complaint filed by General Counsel adequately inform an employer of the violations asserted. *NLRB v. Blake Constr. Co.*, 663 F.2d 272, 279 (D.C. Cir. 1981). Though ALJs are afforded some flexibility when the evidence adduced at trial fit a violation not charged in the complaint, an uncharged violation may be found only where all of

the issues surrounding the violation have been litigated fully and fairly. *NLRB v. Coca Cola Bottling Co.*, 811 F.2d (2d Cir. 1987); *SEIU Local 32BJ v. NLRB*, 647 F.3d 435, 447 (2d Cir. 2011) (stating "the Board may identify a violation of the Act that was not specifically alleged in the complaint or advanced by the General Counsel *if the parties had sufficient notice to satisfy due process*") (emphasis added); *In re Sierra Bullets, LLC*, 340 NLRB 242, 243-43 (2003) (reversing ALJ's finding of a violation on a theory not advanced by the General Counsel because respondent was not given sufficient notice that the issue would be litigated so as to comport with due process). Where, as here, an ALJ has made a finding that a party was not given an opportunity to meaningfully litigate, the Board must, at minimum, remand for further proceedings on that issue. *Enloe Medical Center*, 346 NLRB 854, 855-56 (2006) (remanding for further proceedings where respondent was not given a full and fair opportunity to litigate the violation as found).

As noted, there are a number of findings in the ALJ's decision that were not advanced by General Counsel, that are unsupported by the record as developed at trial, and that Giant Eagle was not given a fair and meaningful opportunity to refute. General Counsel's primary basis for claiming that Giant Eagle's use of waivers violated the Act was that that waivers constituted unlawful employee polling and monitoring under the Act. *General Counsel's Post-Trial Brief* at 12-14. Moreover, to the extent General Counsel argued that the waivers unlawfully shifted blame onto the Union, General Counsel expressly argued that Giant Eagle's "motivation for its conduct is entirely irrelevant." *General Counsel's Post-Trial Brief* at 15. Accordingly, General Counsel did not pursue any claim that Giant Eagle acted out of an improper motive or in retaliation for the Catering Employees exercising their rights under the Act.

Nonetheless, the ALJ concluded that (1) Giant Eagle utilized the wage increase/health benefit waivers as a calculated method of identifying information the Catering Employees wanted and then blaming the Union for the Employees not having the information and (2) Giant Eagle used the Kelli Murphy promotion waiver in retaliation for the representation petition. Regarding the merit increase and health benefits waivers, the ALJ stated as follows:

> Giant Eagle's ***interest*** was in finding something that employees wanted – the information on the upcoming wage and benefit changes – and ***crafting*** a way to blame the Union for Giant Eagle's unwillingness to provide it to employees before the election. The waivers were a ***device*** to place the onus on the Union for Giant Eagle's withholding of this benefit.

ALJD at 15, L 13-17.

Regarding the Kelli Murphy promotion waiver, the ALJ stated as follows:

> The announcement to employees that the employee's application for a promotion would not be considered unless the employees obtained a waiver from the union is also alleged to be unlawful. As discussed herein, I find that the announcement constitutes an unlawful threat of a ***retaliatory*** change in promotion procedures based on employees having filed a union representation petition.
>
> * * *
>
> It is worth pointing out that the "dilemma" Giant Eagle claims ***motivated it to devise*** the Murphy waiver appears to have been wholly avoidable ***if not invented***. Indeed, ***it seems likely*** that waiver demand was a fig leaf – an excuse – to justify Giant Eagle's ***enthusiastic rush*** to disclose to employees that the employee who instigated the union election was trying to leave the unit. . . . Given that Giant Eagle did not hire anyone for the position until three weeks after the election, the dilemma appears to be one of Giant Eagle's own making, created to justify the publicizing of Murphy's job application.[8]

ALJD at 2, L 18-20; *Id.* at 16, L 17-26.

[8] The ALJ's suggestion that Giant Eagle had an improper motive based, in part, on the fact that the position was not filled until three weeks after the election is particularly baffling in light of his comments at trial that the timing of the position being filled was irrelevant. *See Transcript* at 116-17 (ALJ opining that testimony explaining the reason for the delay in filling the position for which Kelli Murphy applied was not relevant, stating "it feels like you're defending thing that aren't really – you're not being accused of"). Moreover, Giant Eagle witness Dan Guevara ultimately gave unrefuted testimony explaining the delay in filling the position. *Transcript* at 119.

The ALJ *sua sponte* developed his own theories for Giant Eagle's purported violation of the Act. These theories substantially departed from General Counsel's allegations, whose primary argument was that leaving a blank space for the Catering Employees to sign the waivers was akin to unlawful polling of employee sympathies and monitoring of employee-union communications. *General Counsel's Post-Trial Brief* at 12-14. Indeed, a review of the trial transcript and the post-trial briefs to the ALJ make it clear that this was the alleged violation advanced by General Counsel and that this was the violation Giant Eagle believed it was defending throughout the trial.

The ALJ's decision to ascribe dishonest, discriminatory, and retaliatory motives to Giant Eagle's actions is not only unsupported by the record, but the ALJ's conclusions in this regard are entirely inconsistent with his repeated admonishments throughout the trial, in response to Giant Eagle's attempts to explain the rationale behind its decision-making, that Giant Eagle's motivations were irrelevant in light of the objective standard for Section 8(a)(1) violations. *See Transcript* at 106 (ALJ stating "this isn't a question of you motivation really"); *Id.* at 107 (ALJ stating "the issue . . . has to turn on what you told employees or other maybe nonverbal context, but not what you would have done if and what – you know things inside your head don't really bear on 8(a)(1) case like this"); *Id.* at 108 (ALJ stating "[Giant Eagle] might have had good motive or bad motive, that's not really the point . . . the question is whether it's objectively a problem").

Notwithstanding the ALJ's rulings at trial, in his subsequent decision he ascribed dishonest, discriminatory, and retaliatory motives to Giant Eagle's actions; motives not alleged by General Counsel or otherwise supported by the record. Because the ALJ's conclusions as to the merits of the Section 8(a)(1) claims were inexorably intertwined with his unsubstantiated

belief that Giant Eagle acted out of a deceptive and retaliatory motive, at a minimum, this matter should be remanded for further proceedings so that Giant Eagle can, for the first time, meaningfully address the ALJ's assertions.

b. The ALJ's decision ignores Board precedent regarding the standards applicable in Section 8(a)(1) claims. (Exceptions 9, 14, 16, 21, 22, 23, 24, 25).

As noted, the only charges against Giant Eagle in this matter alleged four violations of Section 8(a)(1) of the Act. In addition to the above Due Process errors stemming from the ALJ's conclusions, the ALJ's emphasis on Giant Eagle's purportedly improper motivations is inconsistent with the objective standard applicable in Section 8(a)(1) claims.

Pursuant to Section 8(a)(1) of the Act, an employer commits an unfair labor practice if it interferes with, restrains, or coerces employees in the exercise of their rights guaranteed by the Act. 29 U.S.C. § 158(a)(1). However, an employer's mere conveyance of "views, argument, or opinion" unaccompanied by any expression of "threat of reprisal or force or promise of benefit," shall not constitute an unfair labor practice. 29 U.S.C. § 158(c); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-18 (1969). In determining whether an employer has engaged in unlawful coercion in violation of Section 8(a)(1) of the Act, the test is whether the disputed statement or conduct would reasonably tend to coerce or interfere with employee rights. *Smithfield Packing Co.*, 344 NLRB 1 (2004). The inquiry is an objective one, rather than a subjective test turning on whether the employee was actually intimidated. *Multi-Ad Services*, 331 NLRB 1226, 1227-28 (2000). In making this determination, there are no particular factors that are mechanically applied. *A.S.V., Inc.*, 2015 NLRB LEXIS 432, *102-03 (June 9, 2015). Rather, courts look to all of the circumstances in determining whether the conduct at issue tended to be coercive. *Id.*

Pursuant to the above framework, Giant Eagle's actions, when considered in context, had no reasonable tendency to coerce or restrain the Catering Employees in the exercise of their

rights under the Act. Indeed, consistent with the information volunteered to Giant Eagle before the election that the vote was going to be four to three in favor of the Union, the Catering Employees were undeterred by any of Giant Eagle's campaign tactics and ultimately voted to join the Union on election day. Because the ALJ eschewed the objective standard applicable in Section 8(a)(1) claims, instead choosing to focus upon his personal theories as to Giant Eagle's subjective motive, and for the additional reasons set forth below, the ALJ's determination that Giant Eagle restrained and coerced the Catering Employees in the exercise of their rights under the Act must be reversed.

c. The ALJ erred in concluding that Giant Eagle's health benefit and wage increase waivers violated Section 8(a)(1) of the Act. (Exceptions 2, 5, 9, 10, 11, 12, 21, 24, 25).

With respect to the health benefit and wage increase waivers, General Counsel alleged that Giant Eagle violated Section 8(a)(1) of the Act by "condition[ing] receipt of information regarding" the Catering Employees' merit increases and health benefits on employees requesting and obtaining a waiver from the Union. *Complaint* at ¶¶ 7-9. The ALJ agreed, concluding that Giant Eagle hatched a deceptive plan to identify a benefit the Catering Employees wanted, refused to provide the benefit, and then shifted the blame to the Union. Setting aside the Due Process concerns set forth *supra*, the ALJ's conclusion in this regard constitutes a misapprehension of the facts and a misapplication of established Board law.

During a Union organizing campaign, an employer can neither grant new benefits to employees, *see NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964), nor withhold benefits that would have otherwise been granted, *see NLRB v. Aluminum Casting & Eng'g Co.*, 230 F.3d 286 (7th Cir. 2000). As the U.S. Supreme Court has explained, the dangers inherent in well-timed adjustments of benefits is that "[e]mployees are not likely to miss the inference that the source of the benefits now conferred is also the source from which future benefits must flow and which

may dry up if it is not obliged." *Exchange Parts Co.*, 375 U.S. at 409. Thus, "an employer must decide whether or not to grant benefits in the same manner as it would absent the presence of a Union[;]" *i.e.*, "it must act precisely as it would have if the union were not on the scene." *Diamond Motors, Inc.*, 212 NLRB 280, 280 (1974); *see also ALJD* at 11-12 (citing *Diamond Motors*).

A discrete exception to the above-rule is that an employer may postpone a wage or benefit adjustment so long as it makes it clear that it is doing so for the sole purpose of avoiding the appearance of interference in the election's outcome. *See Kauai Coconut Beach Resort*, 317 NLRB 996 (1995) (finding no violation due to employer withholding bi-annual wage increase where there was no evidence that the announcement was "for any reason other than to avoid the appearance of interference with election"); *see also ALJD* at 12 (citing *Kauai Coconut Beach Resort*). In making such an announcement, however, an employer must not shift the onus for the postponement to the union or disparage and undermine the union by creating the impression that it stood in the way of getting their getting planned wage benefit. *Atlantic Forest Products, Inc.*, 282 NLRB 855, 858-59 (1987); *see also ALJD* at 12 (citing *Atlantic Forest*).

Giant Eagle does not dispute the above formulation of the law, as cited by the ALJ, which has its basis in well-settled Board precedent. Indeed, Giant Eagle's decision not to provide the information on an accelerated basis, despite the Catering Employees' request, was in deference to the above-referenced precedents. However, the ALJ's application of the law to the facts raised herein constitutes an unwarranted expansion of these principles; an expansion premised upon the ALJ's misapprehension of the facts.

According to the ALJ, Giant Eagle's conduct was no different from those cases in which an employer announces a delay in conferral of a benefit and then blames the union for the delay.

See ALJD at 15, L 12-17. What the ALJ failed to grasp, however, is that at no point did Giant Eagle announce that it was delaying the Catering Employees' wage increases or health benefits. As the Joint Stipulations signed by General Counsel and the Union acknowledge, Giant Eagle employees are typically given information regarding discretionary wage increases and health benefits in October of each year. *See Joint Stipulations* at 5, 7, and 21. Because the Union election was scheduled just before benefits would have been provided to the Catering Employees (and, indeed all Giant Eagle employees), there was no need for Giant Eagle to postpone any benefits in accord with the above-referenced rules regarding an employer's conferral of benefits during an organizing campaign.

However, the Catering Employees, on their own initiative, then asked Giant Eagle whether it would accelerate the timeline for providing the ***information summarizing the benefits*** (not the benefits themselves) so that they could make informed decisions on election day. As was explained to the Catering Employees, Giant Eagle was concerned that if it complied with the request, it would appear as though it did so in an attempt to interfere with the election. Against this backdrop, Giant Eagle suggested that the Catering Employees obtain a waiver from the Union so that it could provide the information, as requested.

According to the ALJ, Giant Eagle's conduct in this regard was indistinguishable from the employer's conduct in *McCormick Longmeadow Stone*, 158 NLRB 1237 (1966). *See ALJD* at 13 n. 9 ("The Board's decision in *McCormick Longmeadow Stone* is unusually on point."). Though a cursory reading of *McCormick Longmeadow Stone* might reveal similarities to the case *sub judice*, as it also involved an employer's use of waivers, the Board's decision in *McCormick Longmeadow Stone* is distinguishable in several important respects.

In *McCormick Longmeadow Stone*, the employer, desiring to increase its employees' wages in the middle of a representation election, ***initiated*** correspondence with the union over the matter. *Id.* at 1240.[9] Specifically, the employer sent a letter to the union and to each employee in which it ***falsely*** stated that the company "maintained a long-standing practice" of providing employees with wage increases. *Id.*[10] The letter further specified that the employer wanted to provide the wage increase, but did not want to appear as though it was interfering with the election. *Id.* The letter concluded that if the union agreed to waive its right to challenge the election results, the company would provide the wage increase, but that if the union failed to comply with the request for a waiver "we doubt that we will be able to ***institute the proposed benefits*** with the result that our employees will be ***deprived of benefits*** which they are properly entitled to receive and which they should have." *Id.* (emphasis added). Quite understandably, the Board concluded that the employer violated the Act through this conduct, emphasizing that it was unlawful for the employer to suggest that the employees would be ***deprived of the benefit*** unless the union signed the waiver.

Though, as noted *supra*, Giant Eagle's conduct differs from the employer's conduct *McCormick Longmeadow Stone* in several respects, the most important distinction is that Giant Eagle never threatened to deprive the Catering Employees of merit increases, health benefits, or any other substantive benefit if the waivers were not signed or if they ultimately decided to join the Union. Rather, the waivers only addressed whether Giant Eagle could supply information summarizing the benefits in advance of the election, instead of at the scheduled time, as

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[9] It is unrefuted that the Catering Employees raised the issue of the wage increase and health benefits information by requesting the information in advance of the election.

[10] Importantly, the Board in *McCormick Longmeadow Stone* concluded that the employer's misstatement in this regard was intentional. *Id.* at 1238 n.4. Conversely, the record here clearly establishes that Giant Eagle does, in fact, have a long standing practice of granting discretionary wage increases each year and that the increases are typically conferred in October.

requested by the Catering Employees. Though the ALJ summarily dismissed this distinction as "sophistry,"[11] any careful reading of the Board's decision in *McCormick Longmeadow Stone* reveals that the employer's threat to deprive the employees of the substantive benefits at issue was critical to the Board's conclusion that the employer violated the Act.

Without citation to any supporting authority, the ALJ determined that supplying employees with information ***summarizing*** a benefit is itself a substantive benefit under Board precedent.[12] Because the case *sub judice* did not involve conferral or withdrawal of a substantive benefit, but merely the providing of requested information, the policies undergirding the Board's precedents regarding an employer's handling of benefits during an organizing campaign is simply not implicated here.[13] Accordingly, the ALJ erred in concluding that Giant Eagle violated Section 8(a)(1) of the Act through its use health benefit and wage increase waivers.

d. The ALJ erred in concluding that Giant Eagle's use of a waiver regarding Kelli Murphy's promotion application violated Section 8(a)(1) of the Act. (Exceptions 1, 3, 6, 7, 13, 14, 15, 16, 17, 18, 22, 24, 25).

The ALJ also erred in concluding that Giant Eagle committed an unfair labor practice by announcing to employees "that a waiver of the Union's right to object to Kelli Murphy's promotion would be required before Murphy could be interviewed for the new job[.]" *ALJD* at 15, L 24-26. As the ALJ did not cite to any Board precedent in the section of the decision addressing the Kelli Murphy promotion waiver, the precise legal basis for his conclusion is

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[11] Giant Eagle has no comment on the ALJ's use of intemperate language towards a party's good faith argument, and leaves it to the Board to decide whether such language is appropriate from a neutral arbiter.

[12] In fact, both the Board and the Circuit Courts of Appeal have rejected the notion that an employer's distribution of benefits ***summaries*** for ***existing*** benefits during an organizing campaign constitutes the granting of a benefit. *See Beverly Enters. v. NLRB*, 139 F.3d 135, 141 (2d Cir. 1998) (stating "the dissemination of information in the form of benefits summaries was a legitimate campaign strategy; it merely apprised [the] employees of the benefits available to them") (citation omitted).

[13] *See Exchange Parts Co., supra* (stating "[e]mployees are not likely to miss the inference that the source of the benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged").

somewhat unclear.[14] The ALJ apparently determined, however, that the Kelli Murphy waiver was presented in retaliation for the representation petition. *See ALJD* 15, L 26-8 ("This announcement let employees know that a new and discriminatory requirement for the promotion was being imposed on Murphy in retaliation for employees having filed a union representation petition."). Typically, such a claim arises under Section 8(a)(3) of the Act. *See* 29 U.S.C. § 158(a)(3) (making it unlawful for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment encourage or discourage membership in any labor organization"). As noted above, General Counsel did not allege that Giant Eagle engaged in discrimination with respect to Kelli Murphy's promotion application. Rather, General Counsel alleged that the waiver was akin to unlawful polling and monitoring.

> To reiterate, the waiver presented to the Catering Employees provided as follows:
>
> > UFCW Local 23, hereby agrees not to file any Objections or Unfair Labor Practice Charges in connection with the October 7, 2016 election and the Petition filed in Case 6-RC-184367 in the event Kelli Murphy is promoted to the requested Leader Position. However, in the event Ms. Murphy is not promoted, both the Union and Ms. Murphy specifically reserve the right to file Unfair Labor Practice Charges alleging discrimination and retaliation for Union Activity and support – which will then be investigated by the NLRB Regional Office.

Joint Exhibit 4.

The Kelli Murphy waiver, on its face, did not impose a new condition for her promotion or constitute a threat of retaliation for the representation petition. To the contrary, Giant Eagle considered her to be one of the leading candidates for the position, but was concerned about the implication of promoting her in the middle of the election. Specifically, because the Catering Employees had volunteered that Kelli Murphy organized the Union drive and that the vote on

[14] The ALJ's only citation to authority in this section of his decision was a footnote referencing caselaw related to an employer's disavowal of unlawful conduct. *See ALJD* at 16 n. 11 (citing *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978)). The ALJ's footnote provides no clarity as to the legal basis for his conclusion that the Kelli Murphy waiver was unlawful in the first instance.

election day would be four to three, it would have appeared as though Giant Eagle was attempting to undermine the election vote. After explaining this dilemma to the Catering Employees, thereby making its articulated concerns part of the objective circumstances, it presented the Catering Employees with the promotion waiver. Thus, through the promotion waiver, Giant Eagle sought only the ability to proceed with Kelli Murphy's application without concern that doing so would result in challenged election results, and hence a second election. Indeed, the record reflects that Giant Eagle proceeded with her application notwithstanding the lack of waivers, and that she voluntarily withdrew her application. Thus, when considered in context, nothing about the Kelli Murphy waiver tended to restrain or coerce the Catering Employees in the exercise of their rights under the Act.

e. The ALJ erred in concluding that Giant Eagle's announcement of a company-wide pension freeze violated Section 8(a)(1) of the Act. (Exceptions 8, 19, 20, 23, 14, 25).

The ALJ further erred in concluding that Giant Eagle committed an unfair labor practice by inadvertently including the Catering Employees in a company-wide mailing announcing a pension freeze for all non-union employees. According to the ALJ, this violated the Act because "there was nothing in the materials from which an employee could reasonably discern that this announcement of a massive unilateral change to retirement benefits was not in derogation or even retaliation for the recent decision by the employees, in the face of employer disapproval, to have the union represent them on precisely such matters." *ALJD* at 17, L 27-30. However, the ALJ's conclusion that the Catering Employees could reasonably interpret the pension freeze as retaliation for their recent decision to unionize is belied by the fact that the mailings clearly stated that the change applied company-wide to all non-union employees. To reiterate, the cover letter stated, in relevant part, as follows:

Who is affected

> The changes outlined above apply to ***all non-union Team Members*** who are eligible for the Pension Plan and/or the 401(k) Plan. Retirees and terminated vested participants in the Pension Plan (participants who are no longer employed by Giant Eagle but are due a pension benefit in the future) are not affected by these changes.

Joint Exhibit 7(b) (emphasis added).

Additionally, as part of the same mailings, the employees were sent a series of brochures on Giant Eagle's pension plan, which provided additional information and reiterated that the freeze affected all non-union team members. *Giant Eagle's Exhibit* 2; *see also Transcript* at 122-23 (Giant Eagle Exhibit 2 admitted without objection); *Transcript* at 122 (Dan Guevara stating that the brochures and the letters were all part of the same mailing). Giant Eagle's mailings regarding the pension freeze announcement was consistent with its general practice for communicating benefits information on a company-wide basis.[15]

With all of this information available to the Catering Employees, it would have been eminently unreasonable for them to assume, without any supporting evidence, that a company-wide pension freeze affecting thousands of employees was put in place in response to a group of seven (7) catering employees filing a representation petition and voting for the Union. Accordingly, the ALJ's determination that the Catering Employees would reasonably conclude that Giant Eagle announced a company-wide pension freeze affecting thousands of employees in order to retaliate against them for joining the Union simply strains credulity.

Compounding his error further, the ALJ elaborated upon his rationale, analogizing the circumstances here to situations in which an employer announces a unilateral benefit during a representation election wherein the Board will infer that an employer's announcement or grant of benefits is coercive. *See ALJD* at 18 n. 14 (citing *Divi Carina Bay Resort*, 356 NLRB 316

[15] In fact, during her direct examination, Catering Employee Linda Zinkham testified that upon receiving similar mailings from the company summarizing health benefits, she "just assume[d] it was sent company wide." *Transcript* at 37, L 21-22.

(2010)). Without citation to any authority, the ALJ stated that in the immediate aftermath of an election, "an employer announcing a significant unilateral change ***should*** be required to prove context and information about it that would mitigate the reasonable tendency of it to appear to employees as retaliatory or a rejection of union representation." *Id.* (emphasis added).

However, there already exists a body of law dedicated to an employer's unilateral change in benefits after a union is certified. Ordinarily, an allegation related to an employer's post-certification change in benefits is considered a violation of Section 8(a)(5) of the Act. *See* 29 U.S.C. § 158(a)(5) (providing that an employer commits an unfair labor practice if it refuses to bargain collectively with the representatives of its employees); *NLRB v. Katz*, 369 U.S. 736 (1962) (holding, *inter alia*, that an employer violates the Act if it unilaterally changes a term or condition of employment during the collective bargaining process); *Wal-Mart Stores, Inc.*, 352 NLRB 815 (2008) (observing that a different legal standard applies when an employer withdraws or withholds benefits during an election campaign than when an employer withholds benefits after a union is certified).[16] As noted, General Counsel for the Board declined to pursue the Union's Section 8(a)(5) claim because Giant Eagle cured any technical defect related to its inadvertent mailings to the Catering Employees directly by subsequently providing the Union with notice and the opportunity to bargain on the issue of the Catering Employees' pensions. *See Raybestos-Manhattan Inc.*, 168 NLRB 396, 405-06 (1967) (holding that an employer's initial technical violation of Section 8(a)(5) in the announcement of a wage change was cured when the union was thereafter given the opportunity to bargain on that issue); *see also Abrahamson*

[16] In *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), the U.S. Supreme Court held that all Board decisions must have three members in order to satisfy quorum. Though not specifically mentioned by the *New Process Steel* Court, the Board's decision in *Wal-Mart* was rendered by a two-member Board, and is therefore of questionable validity under *New Process Steel*. However, this only calls the Board's ultimate mandate into question, and there is no basis for questioning the Board's legal analysis as to the dichotomy between pre-election claims and post-certification claims, which has its basis in well-settled precedent.

Chrysler-Plymouth, Inc., 234 NLRB 955, 971 (1978) (stating that "absence of formal notification by an employer will not be controlling if the union has actual notice of an employer's intentions at a time when there is sufficient opportunity to bargain prior to implementation of a change"). Affording no deference to the Board's well-settled distinction between an employer's pre-election obligation and post-election obligation with respect to employee benefits, the ALJ essentially created a new basis for independent Section 8(a)(1) violations. The ALJ's analogy to principles regarding an employer's pre-election unilateral change in benefits is therefore inapt, and has the effect of muddling the law in this area. The Board should decline to sanction the ALJ's expansive interpretation of the Act.

f. The ALJ's decision eviscerates Giant Eagle's free speech rights under the First Amendment of the U.S. Constitution and Section 8(c) of the Act. (Exceptions 4, 21, 22, 24, 25).

Pursuant to longstanding U.S. Supreme Court precedent, employers have a First Amendment right to engage in non-coercive speech about unionization. *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469 (1941); *Thomas v. Collins*, 323 U.S. 516 (1945). In order to implement an employer's First Amendment rights, and to encourage free debate on issues dividing labor and management, Congress enacted Section 8(c) of the Act, which protects employer's mere conveyance of "views, argument, or opinion" unaccompanied by any expression of "threat of reprisal or force or promise of benefit," shall not constitute an unfair labor practice. 29 U.S.C. § 158(c); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-18 (1969); *Linn v. Plant Guard Workers*, 383 U.S. 54 (1966); *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008).

As set forth above, none of Giant Eagle's actions violated the Act under the Board's traditional Section 8(a)(1) jurisprudence and Giant Eagle did not issue any threat of reprisal during its campaign. Though the ALJ admonished Giant Eagle for "attacking" and "criticizing"

the Union, this Board has held that, absent coercion, "[w]ords of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1)," *Sears, Roebuck & Co.*, 305 NLRB 193 (1991), and that "the Act countenances a significant degree of vituperative speech in the heat of labor relations." *Atlas Logistics*, 357 NLRB 353, 356 (2001); *see also Enjo Architectural Millwork*, 340 NLRB 1340 (2003) (concluding that an employer's statement that the employees should "think twice" about joining the union was lawful); *Curwood Inc.*, 339 NLRB 1137 (2003) (holding that employer's comment that "[b]eing unionized is also viewed negatively by our customers . . . [t]hat is why we say remaining union-free affects our business and our livelihood" did not violate the Act); *Sears Roebuck & Co.*, *supra* (employer's disparaging comment suggesting that the union "might send someone out to break their legs in order to collect dues" was not unlawful in the absence of coercion).

Far from being disparaging or vituperative, Giant Eagle's speeches were commonplace for any contentious union election. The ALJ's decision to hold Giant Eagle to account for such commonplace speech constitutes an undue infringement upon Giant Eagle's rights under the First Amendment and Section 8(c) of the Act.

VI. Conclusion

For the reasons set forth above, the ALJ committed numerous evidentiary, factual, Due Process, and legal errors in concluding that Giant Eagle committed unfair labor practices pursuant to Section 8(a)(1) of the Act. The ALJ's decision muddles well-settled Board precedent and undermines employer free speech. Accordingly, Giant Eagle respectfully requests that the decision be reversed and that the complaint in this matter be dismissed in its entirety. At minimum, this matter should be remanded for further proceedings so that Gant Eagle can meaningfully litigate findings in the ALJ's decision that were not argued by General Counsel or supported by the record.

Respectfully submitted,

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STATEMENT OF SERVICE

I hereby certify that on April 11, 2018, a true and correct copy of **Giant Eagle's Brief in Support of Exceptions to the Administrative Law Judge's Decision and Order** was electronically filed with the NLRB through its website at www.nlrb.gov. Additionally, a copy was served via email to the following:

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